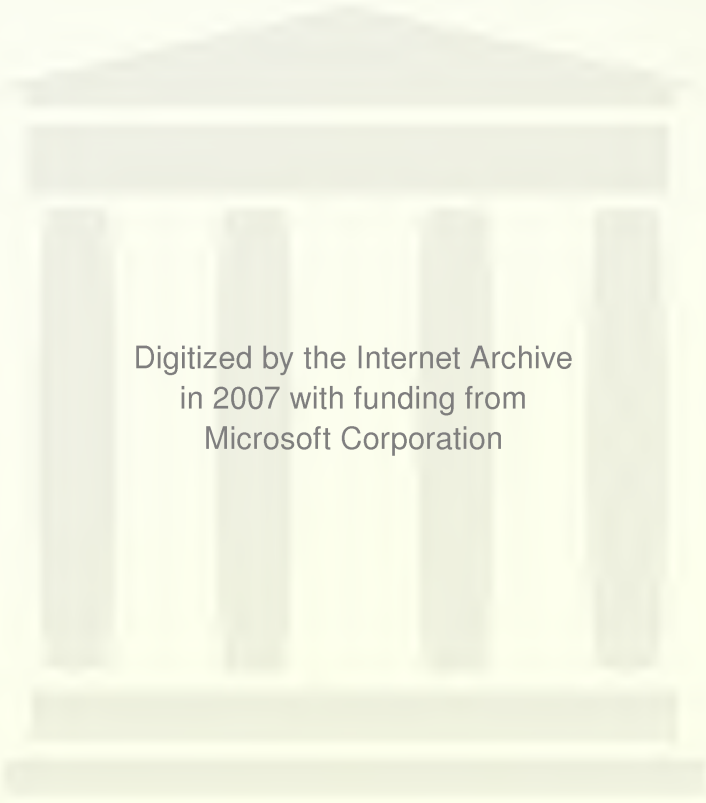

INTERNATIONAL LAW

AND

LAWS OF WAR;

OR,

RULES

REGULATING THE INTERCOURSE OF STATES

IN PEACE AND WAR.

ABRIDGED

FOR THE USE OF COLLEGES AND ACADEMIES.

By H. W. HALLECK, LL.D.,

MAJOR-GENERAL UNITED STATES ARMY;

AUTHOR OF "ELEMENTS OF MILITARY ART AND SCIENCE," "MINING LAWS OF SPAIN AND MEXICO," ETC.

SAN FRANCISCO:

PAINTER & COMPANY, PRINTERS.

1865.

INTERNATIONAL LAW.

CHAPTER I.

HISTORICAL SKETCH.

§ 1. **Division of the subject.** In the following sketch of the history of international law, we shall divide the subject into periods of unequal length, but usually marked by some important event, and having reference rather to the progress of the law than the history of nations. This plan seems preferable to that adopted by Hallam, of dividing it arbitrarily into periods of half a century each. We shall therefore consider the condition of international jurisprudence: 1st, Among the ancients; 2d, From the beginning of the christian era to the fall of the Roman Empire; 3d, From the fall of the Roman Empire to the beginning of the reformation; 4th, From the beginning of the reformation to the peace of Westphalia; 5th, From the peace of Westphalia to the peace of Utrecht; 6th, From the peace of Utrecht to the close of the seven years war; 7th, From the close of the seven years war to the beginning of the French Revolution; 8th, From the beginning of the French Revolution to the congresses of Paris and Vienna in 1814 and 1815; 9th, From the congress of Vienna to the treaty of Washington in 1842; 10th, From the treaty of Washington to the end of the civil war in the United States in 1865.

FIRST PERIOD—INTERNATIONAL LAW AMONG THE ANCIENTS.

§ 2. **International law among the Jews.** The history of the Jews, as derived from the Old Testament and the writings of Josephus, furnishes much information relating to the rules by which the ancient Hebrews regulated their intercourse with other nations in peace and war. Grotius

and other writers on international jurisprudence, have illustrated their own views of public law by numerous examples taken from the history of this singular people, and Selden's International Law of the Jews is a work of great erudition. He very justly distinguishes between the usages and practices which were susceptible of general application, and those limited rules of conduct which constitute the *jus gentium* of the Roman lawyers. As might be expected from an isolated and religious people, most of the laws regulating their international intercourse in peace and war were of the latter character. Nevertheless the history of the ancient Jews is well worthy of careful study in its connection with this branch of public law; but it must be remembered there is much in the Jewish dispensation, although of divine revelation, which has exclusive reference to them as a peculiar people, with a special mission to perform, and therefore not of general application.

§ 3. **Among the ancient Greeks and Romans.** Nearly all our knowledge of international law among ancient states is derived from their intercourse with the Jews, and with the Greeks and Romans, more particularly with the latter. Although no professed treatise on international jurisprudence has been left us by any classical writer, nevertheless much information respecting this branch of public law among the Greeks and Romans has been elicited from their civil laws and military ordinances, and from the history of their numerous wars,—information calculated to throw much light upon the rules by which, at different periods, they regulated their intercourse with other nations. Most of these rules were exclusively founded on religion.

§ 4. **The Jus Gentium of the Romans.** What was called the law of nations (*jus gentium*) by the Romans, was not any positive system or code of jurisprudence established by the consent of all, or even the greater part, of the nations of the world, and applicable alike to themselves and others; it was simply a civil law of their own, made for the purpose of regulating their own conduct toward others in the hostile intercourse of war. It was, therefore, contracted in its nature, and somewhat illiberal in the character of its provisions.

SECOND PERIOD—FROM THE CHRISTIAN ERA TO THE FALL OF THE ROMAN EMPIRE.

§ 5. **Introduction of Christianity.** The doctrines of the christian religion, and the universality of their application, were well calculated to give a milder character and a greater extension to the principles of international law, than they had received either under the Jewish dispensation, or the defective and multifarious system of the Greek and Roman mythology. But its progress was comparatively slow, and the bitter persecutions suffered by the early christians naturally engendered a spirit of retaliation. Moreover, it must be continually borne in mind, while tracing the history of international relations during the reigns of Constantine and the succeeding christian emperors, that the contests which they carried on with barbarous states were not of a character to develop the refinements of a *commercia belli*, or even to cause the observance of the acknowledged usages of war, or the previously established practices of international intercourse in peace.

§ 6. **Effects of the Fall of the Roman Empire.** It is not within the object of this chapter to investigate or describe the causes which finally overthrew the mighty fabric which valor and policy had founded on the seven hills of Rome, nor to trace the history of those barbarous nations of the north, who, by their martial energy, and irresistible numbers and force, imposed their yoke upon the ancient possessors of that vast empire, and permanently settled themselves in its fairest provinces. The decline of taste and knowledge for several preceding ages, and the general corruption of political partizans and office-holders, had prepared the way for this revolution, and the establishment of the barbarian nations on the ruins of the Roman Empire in the west was accompanied, or immediately followed, by an almost universal loss of that learning which had been accumulated in the Greek and Latin languages. What of classical learning is still preserved to us are the mere fragments of those magnificent intellectual temples which industrious

antiquaries have dug up from the vast ruins of ancient greatness. These fragments, however, are sufficient to show the grandeur of the original structure, and the beauty of its architecture; and the value of what remains only increases our regret for what is irrevocably lost.

THIRD PERIOD—FROM THE FALL OF THE ROMAN EMPIRE TO THE BEGINNING OF THE REFORMATION.

§ 7. **International Law during the dark ages.** After the fall of the Roman Empire many cities still preserved their municipal constitutions, and the *jus gentium*, in connection with the *jus civile*, into which many of its principles had become incorporated, continued to be practiced, to a limited extent, both in Italy and the Provinces. Some have attempted to trace its influence upon the institutions and history of the different European nations, even through the darkest ages of human learning; it must, however, be admitted that this influence was not very marked in any case, and was by no means general.

§ 8. **Its origin in Modern Europe.** The origin of the law of nations, in modern Europe, has been traced to two principal sources—the canon law, and the Roman civil law. It was founded, says Wheaton, mainly upon the following circumstances: "First, the union of the Latin church under one spiritual head, whose authority was often invoked as the supreme arbiter between sovereigns and between nations. Under the auspices of Pope Gregory IX., the canon law was reduced into a code, which served as the rule to guide the decisions of the church in public as well as private controversies. Second, the revival of the study of the Roman law, and the adoption of this system of jurisprudence by nearly all the nations of christendom, either as the basis of their municipal code, or as subsidiary to the local legislation of each country."

§ 9. **Effects of Papal Supremacy.** On the formation and consolidation of the christian government in modern times, by Charlemagne, the human mind began to recover from its torpor, and art, science and learning, sprung up out

of the ruins of the ancient world. The church had constituted a kind of bridge, spanning the chaotic gulf which separated declining antiquity from modern civilization. The effects which this change produced upon international relations, and public law in general, may be traced in the lives of such rulers as Charlemagne, the pious king Alfred, king Stephen of Hungary, Rodolph of Hapsburg, and St. Louis of France.

FOURTH PERIOD—FROM THE BEGINNING OF THE REFORMATION TO THE PEACE OF WESTPHALIA.

§ 10. **Effects of the Reformation.** The reformation began to produce its effects upon the minds of men sometime prior to the advent of Luther. Its effects were by no means confined to articles of religious faith. A greater theological liberty was its immediate object, but this was intimately allied with political freedom; and these two necessarily caused a great change in the law of nations. The different states of Europe were ranged under different standards, and each party was united by a kind of *common cause.* Moreover, the separate members of each of the contending masses were bound together by principle or interest, rather than by any recognized paramount authority, for even the catholic states soon ceased to render full obedience to papal supremacy in matters purely temporal. This necessarily led to the independence of sovereign states, the true basis of international jurisprudence. The impulse which had been given to this subject by the canon law was gradually dying away, and the infant science was likely to be smothered and lost by papal dictation and tyranny, when the more liberal notions engendered by the reformation rescued it from destruction, and placed it upon a more sure and firm foundation. Its progress was thenceforth both certain and rapid.

§ 11. **Other causes of its advancement.** Mr. Ward in his "Enquiry into the foundation and history of the law of nations in Europe, from the time of the Greeks and Romans to the age of Grotius," has pointed out and dis-

cussed the influence of christianity, and of the ecclesiastical establishments, in laying the foundation and developing the principles of this branch of jurisprudence. He has also called attention to the obstacles placed in the way of its progress by religious intolerance, and the absurd and dangerous pretensions of the Popes to decide and determine, not only international disputes, but all questions relating to temporal matters connected with the government of independent states, and the effect of the reformation in establishing more liberal principles. Nor has he failed to notice the influence of the Roman law, of the feudal system, of chivalry, of treaties and conventions, and last, though not least, of those twin giants of modern civilization—commerce and trade—and the maritime and commercial laws resulting from the increased intercourse between the people of different cities and countries.

§ 12. **The Rhodian Laws, etc.** The Rhodians were probably among the first to adopt a regular system of laws and regulations relating to maritime trade. This collection of maritime usages is known by the names of *Rhodian Laws*, and *Maritime Law of the Rhodians*. The collection known as the *Rooles* or *Jugemens d'Oléron*, was prepared under the direction of queen Elenor, and named from her favorite island of Oléron. Next we have the *Leges Wisbuenses*, the *Lois de Westcapelle*, the *Coutumes d'Amsterdam*, etc., relating to maritime laws and usages in northern Europe.

§ 13. **The Consolato del Mare, etc.** The *Consolato del Mare* is one of the most curious and venerable monuments of early maritime jurisprudence. The first edition which can now be traced was published at Barcelona in 1494; but some refer it to a much earlier date, and suppose it to contain the maritime usages of the Greek emperors, and of the states and cities bordering on the Mediterranean and other waters. The date of the first publication of the *Guidon de la Mer* is not known, but it was commented on in *Les Us et Coutumes de la Mer*, published in 1647. From the *Ordonnance de la Marine* of Louis XIV., published in 1681, we date the modern system of maritime and commercial law.

§ 14. **Writers prior to Grotius.** The most noted writers,

prior to Grotius, on matters connected with international law, were Macchiavelli, Victoria, Soto, Suarez, Ayala, Bolaños, Bodinus, Gentilis, Peckius, Straccha and Sauterna.

§ 15. **Writings of Grotius.** Hugo Grotius is justly regarded as the founder of this branch of jurisprudence. He was born in Holland in 1583, and died in 1645. His great work, *de Jure Belli ac Pacis*, was published at Paris in 1625. Grotius wrote during the "thirty years war,"—that fierce struggle for religious liberty which was terminated a short time after his death by the peace of Westphalia, based on the principles which he had so ably and earnestly advocated.

FIFTH PERIOD—FROM THE PEACE OF WESTPHALIA TO THAT OF UTRECHT, 1648–1713.

§ 16. **Political Events of this period.** Although the peace of Westphalia terminated that memorable struggle in Germany against the preponderance of the house of Austria, war continued to rage in other parts of Europe until the treaty of Utrecht in 1713.

§ 17. **Questions agitated.** Of the questions particularly discussed during this period we may mention those relating to the independence of states, the liberty of the seas, the rights of conquest and pre-emption, the theory of maritime prize, the law of sieges and blockades, the belligerent right of visitation and search, and the treatment due to prisoners of war. In many of these subjects a considerable advance was made from the restricted rules of the *jus gentium* of the Romans, and even from the more liberal principles established by Grotius; but, in others, the progress of this branch of jurisprudence scarcely kept pace with the increasing civilization of nations.

§ 18. **Writers following Grotius.** The principal writers on international law, immediately following Grotius, were Selden, Hobbes, Puffendorf, Spinoza, Zouch, Loccenius, Molloy, Jenkins, Cumberland, Wicquefort, Rachel, Leibnitz, Stypmanus, Kuricke and Roccus.

SIXTH PERIOD—FROM THE PEACE OF UTRECHT TO THE END OF THE SEVEN YEARS WAR, 1713—1763.

§ 19. **Political events of the period.** The peace of Utrecht was followed by the maritime war between England and Spain; by the war of the Austrian succession; and lastly by the "seven years war," which served to develop the military resources of Prussia, and to display the brilliant genius of Frederick the Great.

§ 20. **Questions agitated.** During this period arose the celebrated question of the Silesian loan, which led to important discussions. Great Britain attempted to establish the doctrine denominated the "Rule of 1789." Many questions also gave rise to discussion in regard to the rights and privileges of public ministers, and the rules of diplomatic etiquette.

§ 21. **Writings of publicists.** This period was prolific in writers on questions of international law, among the most distinguished of which we may mention the names of Bynkershoek, Wolfius, Vattel, Montesquieu, Heineccius, Barbeyrac, Mably, Emerigon, Valin, Burlamaqui, Pothier, Casaregis, Real, Rutherforth, Tindall, Hubner, Abreu and Dumont.

SEVENTH PERIOD—FROM THE SEVEN YEARS WAR TO THE FRENCH REVOLUTION, 1763—1789.

§ 22. **Political events.** This period is marked by the partition of Poland, the war of Bavarian succession, the mediation of France between Joseph II. and the United Provinces, the tripple alliance between Great Brittain, Prussia and Holland in 1788, and the American Revolution which secured the independence of the United States and led to the wars of the French Revolution.

§ 23. **Questions agitated.** The more important questions of international law agitated during this period were those connected with the independence of states, the right of intervention and mediation, and the right of revolution.

Among those relating to maritime jurisprudence, we may mention the rule of *free ships, free goods*, which was recognized and attempted to be established by the French ordinance of 1778; the rights of neutral commerce, as declared by the armed neutrality of 1780; and the abolition of privateering, as agreed upon by Prussia and the United States in the treaty negotiated by Franklin in 1785.

§ 24. **Writings of publicists.** The most distinguished writers of this period on international law, were the two Mosers, Lampredi, Galiani, G. F. Martens, Mirabeau and Bentham. Among those of less note we may mention Neyron, Gunther, Van Romer, Wench and Schmass.

EIGHTH PERIOD—FROM THE BEGINNING OF THE FRENCH REVOLUTION TO THE CONGRESS OF VIENNA, 1789—1815.

§ 25. **Political events.** The conflict of opinions and interests growing out of the events of the French revolution engendered a war which soon involved nearly all the states of Europe and America. The whole period is marked by encroachments on the true principles of international law, and a total disregard of the rights of sovereign and independent states.

§ 26. **Questions agitated.** Among the questions more particularly discussed during this period, we may mention the right of armed intervention, the laws of war in regard to military occupation and conquest, to sieges and blockades, to prize and booty, and to the treatment and exchange of prisoners of war. The law of contraband, the rights of colonial and neutral trade, and the rights of visit, search, impressment and pre-emption, were also matters of warm dispute between the great maritime powers.

§ 27. **Writings of publicists.** Although this was eminently a period of action rather than of calm discussion and investigation, it produced several able text-writers on international law, among which we may mention Azuni, Martens, Kant, Koch, Savigny, Ward, Mackintosh, Dou, Flassan, Rayneval, Jouffroy, Jacobson, Merlin and Marin.

§ 28. **Judicial Decisions.** Much importance was attached during this period to the opinions and decisions of judicial tribunals on questions of international law, many of which were characterized by profound learning and great legal ability. In maritime law none have been more distinguished for learning, sagacity and comprehensive views, than Sir Wm. Scott, afterward Lord Stowell. The opinions of this great jurist must, however, be consulted with due caution, on account of his leaning toward British precedents and British pretensions.

NINTH PERIOD—FROM THE CONGRESS OF VIENNA TO THE TREATY OF WASHINGTON, 1815–1842.

§ 29. **Political Events.** Europe, exhausted by the great wars of the French revolution and empire, which were terminated in 1815, enjoyed a long period of general peace. The local revolutions in Greece, France, Belgium, Poland, etc., and the war of 1829, between Russia and the Porte, were too limited in extent, and too temporary in their character, to disturb the general tranquility. In America the Spanish and Portuguese provinces, during this period, threw off the colonial yoke and assumed the position and rank of sovereign and independent states. The treaty of Ghent, in 1814, between the United States and Great Britain, had left unsettled many of the causes of the war of 1812, which were again likely to involve the two countries in serious difficulties, but most of these points of dispute were happily settled by the treaty of Washington in 1842, and a general peace prevailed throughout the civilized world.

§ 30. **Questions agitated.** During this period many of the questions of international law which had arisen in the previous wars were elaborately discussed. The attention of publicists was also directed to new ones, or, at least, old questions presented under new circumstances. Among these we may mention the rights and duties of neutrality; the right of revolution and intervention; the right of visitation and search in time of peace; of exclusive territorial jurisdiction; and the free navigation of great rivers, as the Rhine, the St. Lawrence, etc.

§ 31. **Writings of publicists.** Among the more distinguished publicists of this period we may mention the names of Kamptz, Kluber, Hegel, Wheaton, Kent, Story, Manning, Lieber, Bello, Pfeiffer, C. De Martens, Garden, Pardessus, Boulay-Paty, Hauterive, De Cussy, De Felice, Schoel, etc.

TENTH PERIOD — FROM THE TREATY OF WASHINGTON TO THE END OF THE AMERICAN REBELLION, 1842-1865.

§ 32. **Political events.** During this period we have, in Europe, the revolution in France and the restoration of the Bonapartes; abortive revolutions in Germany, Poland, Hungary, and elsewhere; the Crimean war, and the war in Italy; and lastly, the Schleswig-Holstein German war. In America we have the war between the United States and Mexico, and the resulting *filibuster expeditions*, with civil wars in Mexico and the Central and South American Republics; and lastly, the great rebellion in the United States, and the invasion of Mexico by the French.

§ 33. **Questions agitated.** This period has probably given rise to more important questions of international law than any one which preceded it. Among these we may mention the rights of intervention; of military occupation and conquest; of annexation and secession; of visit, search and blockade, and of neutral trade; and, in fine, innumerable points in regard to international, political, and personal rights and duties growing out of rebellion and civil war.

§ 34. **Writings of publicists.** This period has been prolific in works on international law and its kindred subjects. Among the more distinguished authors we will mention Wheaton, Duer, Story, Reddie, Wildman, Westlake, Phillimore, Twiss, Lieber, Woolsey, Hautefeuille, Ortolan, Fœlix, Massé, Pouget, Pistoye and Duverdy, Heffter, Pando, Riquelme, etc.

§ 35. **Judicial Decisions.** Some of the numerous and important questions of international law which have been agitated within the last twenty-five years have been most elaborately discussed in the decisions and opinions of emi-

nent judges. None of these have shown greater ability than the late Chief Justice Marshall, and Justice Story, of the United States Supreme Court. The decisions of these two eminent judges on questions of international law, and more particularly of maritime capture, rank, at least, next to those of Sir Wm. Scott, and, on some points, they are now regarded as the better authority.

§ 36. **Diplomatic Papers, etc.** More full and complete discussions may be found in the diplomatic correspondence, parliamentary debates and periodical literature. Many of the state papers of Webster, Marcy and Seward, on these subjects, are admirable, and some of the debates of Lyndhurst, Palmerston, Russell, Bright, and Cobden, throw much light on the legal questions discussed. Many valuable articles on international subjects may be found in the periodical literature of the day, and questions arising under the laws of war have sometimes been discussed with marked ability in the correspondence of military officers.

CHAPTER XVIII.

RIGHTS OF WAR AS TO ENEMY'S PERSON.

§ 1. **General Rights as to Enemy's person.** It has already been shown that war places all the subjects of one belligerent state in a hostile attitude toward all the subjects of the other belligerent; and although, in order to justify us at the tribunal of conscience, and in the estimation of the world, it is necessary that we should have just cause of war, and justifiable reasons for undertaking it, yet, as the justness or unjustness of a war is usually a matter of controversy between the contending parties, and not always easy to be determined, it has become an established principle of international jurisprudence that a war in form shall, in its legal effects, be considered as just on both sides, and that whatever is permitted to one of the belligerents shall also be permitted to the other. The law of nations makes no distinction, in this respect, between a just and an unjust war, both of the belligerent parties being entitled to all the rights of war as against the other, and with respect to neutrals. Each party may employ force, not only to resist the violence of the other, but also to secure the objects for which the war is undertaken. The first and most important of these rights, which the state of war has conferred upon the belligerents, is that of taking human life.

§ 2. **Limitation of right to take life.** But this extreme right of war, with respect to the enemy's person, has been modified and limited by the usages and practices of modern

warfare. Thus, while we may lawfully kill those who are actually in arms and continue to resist, we may not take the lives of those who are not in arms, or who, being in arms, cease their resistance and surrender themselves into our power. The just ends of the war may be attained by making them our prisoners, or by compelling them to give security for their future conduct. Force and severity can be used only so far as may be necessary to accomplish the object for which the war was declared.

§ 3. **Exemption of Non-combatants.** There are certain persons in every state who, as already stated, are exempt from the direct operations of war. Feeble old men, women and children, and sick persons, come under the general description of enemies, and we have certain rights over them as members of the community with which we are at war; but, as they are enemies who make no resistance, we have no right to maltreat their persons, or to use any violence toward them, much less to take their lives. This, says Vattel, is so plain a maxim of justice and humanity that every nation, in the least degree civilized, acquiesces in it. And modern practice has applied the same rule to ministers of religion, to men of science and letters, to professional men, artists, merchants, mechanics, agriculturists, laborers — in fine, to all non-combatants, or persons who take no part in the war, and make no resistance to our arms.

§ 4. **Exemption may be forfeited.** But the exemption of the enemy's persons from the extreme rights of war is strictly confined to non-combatants, or such as refrain from all acts of hostility. If the peasantry and common people of a country use force, or commit acts in violation of the milder rules of modern warfare, they subject themselves to the common fate of military men, and sometimes to a still harsher treatment. And if ministers of religion, and females, so far forget their profession and sex as to take up arms, or to incite others to do so, they are no longer exempted from the rights of war, although always within the rules of humanity, honor and chivalry. And even if a portion of the non-combatant inhabitants of a particular place become active participants in hostile operations, the entire commu-

nity are sometimes subjected to the more rigid rules of war.

§ 5. **Exceptions to rule of exemption.** Moreover, in some cases, even where no opposition is made by the non-combatant inhabitants of a particular place, the exemption properly extends no further than to the sparing of their lives; for, if the commander of the belligerent forces has good reason to mistrust the inhabitants of any place, he has a right to disarm them, and to require security for their good conduct. He may lawfully retain them as prisoners, either with a view to prevent them from taking up arms, or for the purpose of weakening the enemy. Even women and children may be held in confinement, if circumstances render such a measure necessary, in order to secure the just objects of the war. But if the general, without reason, and from mere caprice, refuses women and children their liberty, he will be taxed with harshness and brutality, and will be justly censured for not conforming to a custom established by humanity. When, however, he has good and sufficient reasons for disregarding, in this particular, the rules of politeness and the suggestions of pity, he may do so without being justly accused of violating the laws of war.

§ 6. **Prisoners entitled to quarter.** As the right to kill an enemy, in war, is applicable only to such public enemies as make forcible resistance, this right necessarily ceases so soon as the enemy lays down his arms and surrenders his person. After such surrender, the opposing belligerent has no power over his life, unless new rights are given by some new attempt at resistance. "It was a dreadful error of antiquity," says Vattel, "a most unjust and savage claim, to assume a right of putting a prisoner of war to death, and even by the hand of the executioner." By the present rules of international law, quarter can be refused the enemy only in cases where those asking it have forfeited their lives by some crime against the conqueror, under the law and usages of war.

§ 7. **Made slaves in ancient times.** According to the laws of war, as practiced by some of the nations of antiquity, and by savage and barbarous nations of the present time,

prisoners of war might be sold to private individuals, or held by their captors as slaves. This right was claimed and exercised as resulting from the right to put them to death, and was deemed a mitigation of the extreme right of war. But when the laws of war prohibited the captors from taking the lives of his prisoners, the right to enslave them also ceased. It is now claimed and exercised only by savages and barbarians.

§ 8. **Ransom and exchange.** The ancient practice, of putting prisoners of war to death, or selling them into slavery, gradually gave way to that of *ransoming*, which continued through the feudal wars of the middle ages. By a cartel of March 12th, 1780, between France and England, the ransom, in the case of a field-marshal of France, or an English field-marshal, or captain-general, was fixed at sixty pounds sterling. And even as late as the treaty of Amiens, in 1802, between Great Britain and the French and Bavarian Republics, it was deemed necessary to stipulate that the prisoners on both sides should be restored *without ransom*. The present usages, of exchanging prisoners without any ransom, was early introdueed among the more polished nations, and was pretty firmly established in Europe before the end of the seventeenth century.

§ 9. **No positive obligation to exchange.** But this usage is not, even now, considered obligatory upon those who do not choose to enter into a cartel for that purpose. "Whoever makes a just war," says Vattel, "has a right, if he thinks proper, to detain his prisoners till the end of the war." * * * "If a nation finds a considerable advantage in leaving its soldiers prisoners with the enemy during the war, rather than exchange them, it may certainly, unless bound by cartel, act as is most agreeable to its interests. This would be the case of a state abounding in men, and at war with a nation more formidable by the courage than the number of its soldiers. It would have been of little advantage to the Czar, Peter the Great, to restore the Swedes, his prisoners, for an equal number of Russians."

§ 10. **Moral obligations of the state.** But while no state is obliged, by the positive rules of international law, to

enter into a cartel for the exchange of prisoners of war, there is a strong moral duty imposed upon the government of every state to provide for the release of such of its citizens, and allies, as have fallen into the hands of the enemy. They have fallen into this misfortune only by acting in its service, and in the support of its cause. "This," says Vattel, "is a care which the state owes to those who have exposed themselves in her defense."

§ 11. **Release on Parole.** Sometimes prisoners of war are permitted to resume their liberty, upon the condition or pledge that they will not take up arms against their captors for a limited time, or during the continuance of the war, or until they are duly exchanged. Such pledges are called *military paroles;* and when agreements of this kind are made within the limits of the powers, specified or implied, of the parties making them, they are binding both upon the individuals and upon the state to which they belong. But there are certain limits to the conditions which the captor may impose, and to the stipulations or pledges which the prisoner may enter into. For example: no prisoner can enter into stipulations inconsistent with his duties to his state, or the laws of his government, or the orders of his superiors; he cannot pledge his parole not to bear arms against the same enemy or against any other nation not at the time an ally of his captor; and if his own government has specified other limits to the obligations he may contract, he cannot exceed these limits. Moreover, if his captors are aware of such limitations at the time, the obligations which they impose in excess of his authority to contract, are not binding.

§ 12. **United States Regulations in regard to paroles.** The United States, in instructions for the government of their armies in the field, (General Orders No. 100 for 1863,) have laid down the general principles relating to military paroles, and prescribed particular rules and limits in giving such paroles. And any obligations entered into in violation of these rules, unless authorized by a special cartel, duly approved, are held to be null and void.

§ 13. **Duty of a state when it forbids paroling.** Vattel places the duty of a state to provide for the support of its

subjects while prisoners of war in the hands of an enemy, upon the same grounds as its duty to provide for their ransom or release by exchange. Indeed, a neglect or refusal to do so, would seem to be even more criminal than a neglect or refusal to provide for their exchange; for the exigencies of the war may make it the temporary policy of the state to decline an exchange, but nothing can excuse it in leaving its soldiers to suffer in an enemy's country, without any fault of their own. It follows, therefore, that although we may properly, under certain circumstances, refuse an exchange, we cannot neglect to make proper arrangements for the support of such prisoners as the enemy is willing to exchange on fair and equitable terms.

§ 14. **General rule for support of prisoners.** As there is usually no great disparity of numbers of prisoners taken by the opposing belligerents in the course of the war, it is the modern practice for each captor to support those who fall into their hands till an exchange can be effected. The burthen of their support is thus not unequally distributed between the parties to the war. Sometimes, however, so very large a number is taken by one party as to leave no probability of an immediate exchange. The captor then has no alternative but to support his prisoners himself, or to release them on parole. But if there has been an agreement that each party shall provide for the support of its prisoners in the hands of the other, then the state to which they belong is bound to provide for the case as early as possible. Such matters are usually regulated by general or special cartels, and commissioners, or commissaries, are permitted to reside in the respective belligerent countries to provide for the subsistence and care of their prisoners of war. But to make such conventional arrangements is not obligatory, for neither party is bound to receive such commissioners, or commissaries of prisoners, and, in case of rebellion and civil war, they are often, for good reasons, refused.

§ 15. **Where exchanges cannot be effected.** It not unfrequently happens in war that, although both parties are willing to exchange prisoners, much difficulty and delay occur in agreeing upon the terms of the cartel. And even

after these terms have been agreed upon, a delay necessarily occurs in returning the prisoners to their own country, or to the points agreed upon for their delivery. In all such cases, as well as where no exchange or agreement, in regard to their support, has been made, each captor is bound to provide his prisoners with the necessaries of life, such as food, clothing, fuel, etc. He cannot allow them to suffer or starve. Even if his offer to exchange has been refused, he is still bound to treat those who fall into his hands with humanity. Under ordinary circumstances prisoners of war are not required to labor beyond the usual police duty of camp and garrison; but, where their own state refuses, or wilfully neglects, to provide for their support, it is not unreasonable in the captor to require them to pay with their labor for the supplies which he furnishes them. Where one of the belligerents requires such labor from his prisoners of war, the other is always justifiable in doing the same. The modern rules of war do not forbid this; but no degrading, or very onerous labor, should be imposed.

§ 16. **Character of support to be given.** Where circumstances render it obligatory upon the captor to support the prisoners which he has taken, this support is usually limited to the regular provision ration, and such clothing and fuel as may be absolutely necessary to prevent suffering. Officers, and other persons, who have the means of paying for their support, cannot require any assistance from the captor. But such as have no money are certainly entitled to an allowance sufficient for personal comfort; and modern custom, and military usage, require that it should be proportioned to the rank, dignity and character of the prisoner. It, however, can never properly be required for any considerable length of time, as prisoners of this description are bound to provide for their own support as soon as they can procure the means of doing so. Moneys and valuables found upon the persons, or in the baggage, of prisoners when captured, may be, and usually are, applied to the support of themselves and their comrades. Watches and articles of jewelry, of limited value, are most commonly left to their individual owners. But all large sums are legitimate booty, and are

appropriated or disposed of according to the laws of the capturing belligerent.

§ 17. **Cases of ill-treatment and starvation.** Although the rules of international law, as well as the obligations of humanity, require the captor to either release his prisoners or to provide for their decent and proper support, there have been recent instances of treatment of such prisoners which would have disgraced the most barbarous ages. The cruelty of the Spaniards to the French prisoners confined at Cabrera, and of the rebel authorities to the United States soldiers confined at Richmond, Andersonville, and other southern prison-pens, furnish some of the darkest pages in modern history, and are disgraceful to the perpetrators. Such conduct may be punished by retaliation upon the guilty parties.

§ 18. **Where the captor is unable to support his prisoners.** Sometimes a belligerent captures more prisoners than he can properly support for any considerable length of time In such cases he may parole them so that they may earn their own support in his territory, or may return to their own country, under the usual obligations attached to such paroles. Attempts have sometimes been made to annul such engagements, and to force released prisoners of war to take up arms in the same campaign, in direct violation of their parole. Such an act, on the part of a belligerent government, is utterly futile as a protection to soldiers who may thus violate a parole legally and properly given. We have an example in the war between the United States and Mexico, which general Scott promptly met by retaliatory measures.

§ 19. **May he kill them in certain cases?** But suppose a general has taken so large a number of prisoners that he cannot guard and feed them, and cannot safely release them on parole, will the law of self-defense justify him in sacrificing them as Henry V. did after his victory at Agincourt, or as Admiral Anson did with the prisoners taken on an Acapulco galleon?

§ 20. **This fordidden by modern law.** Vattel seems to think that there may be extreme cases where the captor is justified in destroying his prisoners. Probably this opin-

ion was justified by the practices of the age in which he wrote, and of those which preceded it, but, at the present day, the conduct of any general who should deliberately put to death unresisting prisoners, would be declared infamous, and no possible excuse would remove the stain from his character.

§ 21. **Useless defense of a place.** It was an ancient maxim of war, that a weak garrison forfeit all claim to mercy on the part of the conqueror, when, with more courage than prudence, they obstinately persevere in defending an ill-fortified place against a large army, and when, refusing to accept of reasonable conditions offered to them, they undertake to arrest the progress of a power which they are unable to resist. Pursuant to this maxim, Cæsar answered the Aduatici that he would spare their town if they surrendered before the battering-ram touched their walls. But, though sometimes practiced in modern warfare, it is generally condemned as contrary to humanity, and inconsistent with the principles which, among civilized and christian nations, form the basis of the laws of war.

§ 22. **Sacking a captured town.** We do not, at the present day, often hear, when a town is carried by assault, that the garrison is put to the sword in cold blood, on the plea that they have no right to quarter. Such things are no longer approved or countenanced by civilized nations. But we sometimes hear of a captured town being sacked, and the houses of the inhabitants being plundered on the plea that it was impossible for the general to restrain his soldiery in the confusion and excitement of storming the place; and, under that softer name of *plunder*, it has sometimes been attempted to veil "all crimes which man, in his worst excesses, can commit; horrors so atrocious that their very atrocity preserves them from our full execration, because it makes it impossible to describe them."

§ 23. **Examples.** Many terrible atrocities of this kind were committed in the war of the Spanish Peninsula; and it would be difficult to find, in the history of the most barbarous ages, scenes of drunkenness, lust, rapine, plunder, cruelty, murder and ferocity, equal to those which followed the

captures of Ciudad Rodrigo, Badajos, and San Sebastian. These were attempted to be excused on the ground that the soldiers could not be controlled. But this was no valid excuse. An officer is generally responsible for the acts of those under his orders. Unless he can control his soldiers, he is unfit to command them. In the same way, rebel officers were responsible for the murder of our captured negro troops, whether or not by their orders.

§ 24. **Fugitives and deserters.** Fugitives and deserters, says Vattel, found by the victor among his enemies, are guilty of a crime against him, and he has an undoubted right to punish them, and even to put them to death. They are not properly considered as military enemies, nor can they claim to be treated as such; they are perfidious citizens, who have committed an offense against the state, and their enlistment with the enemy cannot obliterate that character, nor exempt them from the punishment they have deserved. They are not protected by any compact of war, as a truce, capitulation, cartel, etc., unless specially and particularly mentioned and provided for.

§ 25. **Rule of reciprocity.** In the operations of war, a belligerent not unfrequently adopts the *rule of reciprocity*, both with respect to the person and property of the enemy. There certainly is equity and good sense in the rule of meting out to an enemy the same measure of justice which we receive from him. Thus, if he releases his prisoners of war on *parole*, we do the same; if he forces his prisoners to labor for their support, we do the same; if he levies heavy contributions, or, exercising the extreme rights of war, seizes or destroys public and private property, we retaliate by measures of the same character.

§ 26. **Limitation of the rule.** But there is a limit to this rule of reciprocity. If our enemy refuses to shape his conduct by the milder usages of war, and adopts the extreme and rigorous principles of former ages, we may do the same; but if he exceed these extreme rights, and becomes barbarous and cruel in his conduct, we cannot, as a general rule, retort upon his subjects by treating them in like manner. We cannot exceed the limits which humanity has prescribed

to the rights of belligerents. Suppose our enemy should use poisoned weapons, or poison the food and water which we use, the rule of reciprocity would not justify us in resorting to the same measures. Should he massacre or starve his prisoners, we cannot follow his example. A savage enemy might kill alike old men, women and children; but would any civilized power resort to similar measures of cruelty and barbarism, under the plea that they were justified by the law of retaliation? And yet a reckless enemy sometimes leaves to his opponent no other means of securing himself against the repetition of barbarous outrages. While, therefore, retaliation cannot be entirely dispensed with in the operations of war, it should be used only as a means of protective retribution, and never as a measure of mere revenge. Inconsiderate and extreme retaliation only removes the belligerents further and further from the rules of regular warfare, and gives play to the passions of a savage nature. Wherever it is possible to punish the parties offending, severe retaliation upon innocent persons should not be resorted to.

§ 27. **Special cases where quarter may be refused.** In the internecine wars of former ages, when the killing of an enemy was regarded as the object of the war, rather than as the means of obtaining peace, it was frequently resolved to give no quarter on either side. This is opposed to modern usage, except as a measure of preventive retaliation. Troops who give no quarter, are not entitled to receive any. The same rule applies to those who by crimes and cruelties make themselves military outlaws. Enemies who, for the purpose of deceiving in battle, fight in our uniform without any manifest mark of distinction, or under our flag or other emblem, are not entitled to quarter. By such acts of military perfidy, they forfeit all claims to protection under the laws of war, even when taken as prisoners. They may be tried and punished for the particular offense, or be summarily despatched as military outlaws.

§ 28. **Disguise and perfidy**. Men, or squads of men, who commit hostilities, whether by fighting, or by raids or inroads for the destruction and plunder of public or private property, without commission, pay, or regular organization,

who serve in the garb of citizens, or who, at intermitting periods, divest themselves of the character and appearance of soldiers, and, assuming the semblance of peaceful pursuits, return to their homes and avocations—such men, or squads of men, are not public enemies, and, therefore, when captured, are not entitled to the treatment of prisoners of war, but may be treated summarily as highway robbers and pirates. Armed prowlers, by whatever names they may be called, who, disguised in the dress of the country or in the uniform of their enemies, are found within the lines of the army hostile to their own, or within territory in the military occupation of such army, for the purpose of robbing or plunder, or of destroying bridges, canals, roads, telegraph lines, &c., are not entitled to the privileges of prisoners of war, and such acts of perfidy may be punished with death.

§ 29. **War-rebels, &c.** War-rebels, or war-traitors as they are sometimes called, are persons within an occupied territory who rise in arms against the occupying or conquering power, or who convey information or assistance to the government which has been expelled from such territory. It will be shown in the chapter on military occupation that the inhabitants of territory so occupied owe a temporary or qualified allegiance to the conqueror and that their allegiance to the former government is suspended during such military occupation. In return for the leniency of the conqueror in not expelling them from the occupied country, they are bound to conform to his authority and to render no aid to his enemy. If they take up arms or conspire against his authority, whether directed to do so or not by the expelled government, their punishment is death. The same penalty attaches if they convey unauthorized information or assistance to the army or authorities of the expelled belligerents; or if they voluntarily serve as guides, or offer to do so, to his raids or forays into the occupied district. No person forced by an enemy to serve as a guide is punishable for having done so; but if he intentionally give false information, he may be put to death for his treachery.

A messenger captured in territory militarily occupied, while carrying written despatches or verbal messages from

the expelled belligerent, may or may not be punishable; if armed and in the uniform of his army, he is to be treated by the captor as a prisoner of war; if not in uniform, nor a soldier, and is attempting to steal through the occupied territory to further the interests of the enemy, he will be punished as a spy, or otherwise, according to the circumstances of the case.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from the laws of war, on account of their foreign character. If they communicate with or assist the enemy, they may be expelled from the occupied territory, or suffer such other punishment as the circumstances of the case may require.

§ 30. **Limitation as to time of punishing military offenses.** There is a law of limitation applicable to the punishment of military offenses which resembles in a manner that which applies to crimes at the civil law. The criminality of some military offenses ceases with the completion of the act and the return of the perpetrator to the jurisdiction of the opposing belligerent, while others are punishable at any and all times, at least so long as the war continues. To the latter class belong those offenses which are assimilated to capital crimes at the civil law, such as military surrenders and assassinations, poisonings, inhuman treatment of prisoners, acts of military perfidy. For example, the taking of life by guerrilla bands, or other unauthorized belligerents, is a military murder, which is as subversive of civilized society as a murder in time of peace. Hence the crime is considered to adhere to the actor, and the penalty continues to attach to the offense. On the other hand, the act of spying is an offense only under the laws and usages of war; it is no crime against society in time of peace. Hence a successful spy, safely returned to his own army, and afterward captured as an enemy, is not subject to punishment for his acts as a spy: he is entitled to be treated as a prisoner of war, but he may be subjected to restraint and held in close custody as a person individually dangerous. On this subject Saalfeld remarks: "The spy himself, except a subject who serves as a spy against his own sovereign, is not guilty of any *crime*

in the sense that term is used in the law of nations, and, although military usages (*Raison de guerre*) universally permit the execution of a spy, nevertheless this procedure is not to be considered as a punishment, but simply as a means of prevention, (or of deterring persons from the commission of the act of spying;) this also serves as a reason why he who has ceased to be a spy cannot be executed. The severe treatment of the spy is permitted by international law only against him *who is caught in the act;* but if the spy has committed, at the same time, a *crime* at international law, he may at any time be punished for this particular crime."